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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 690

INSURANCE GROUP COMMITTEE, REORGANIZATION COMMITTEE, GUARANTY TRUST COMPANY OF NEW YORK, Trustee, CENTRAL HANOVER BANK AND TRUST COMPANY, Trustee, UNITED STATES TRUST COMPANY OF NEW YORK, Trustee, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee,

Petitioners,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement

This Brief is filed by The Denver and Rio Grande Western Railroad Company, Debtor, and The Denver & Salt Lake Western Railroad Company, Subsidiary Debtor (herein together called the Respondents) in opposition to a Petition of an Insurance Group Committee and others for a writ of *certiorari* to review an Order entered on November 2, 1946 in the United States Circuit Court of Appeals for the Tenth Circuit by Circuit Judge PHILLIPS in a reorganization proceeding under Section 77 of the National Bankruptcy Act (Petition, page 1).

The Order of the Circuit Court of Appeals which the Petitioners seek to have reviewed in this Court is one which does no more than preserve the status of the litigation pending a review by that Court pursuant to an appeal regularly taken and perfected of an Order of the District Court of the United States for the District of Colorado (Judge SYMES) denying a Petition of the Respondents asking that the proceeding be referred back to the Interstate Commerce Commission for the formulation of a new Plan of Reorganization (Record, pages 10, 14).

The certified Plan of Reorganization had been approved and confirmed by the District Court by Order dated October 25, 1943 and November 29, 1944, respectively, and these Orders were affirmed and reinstated by this Court under its decision rendered June 10, 1946. (*Reconstruction Finance Corporation* v. *Denver and Rio Grande Western Railroad Company*, 90 L. Ed. 1134; 1138.)

The Respondents' Petition filed in the District Court September 17, 1946, does *not* embrace or relate to any matter heretofore determined by this Court under writs of *certiorari* previously issued in connection with the certified Plan but alleges and presents formally for the first time a new situation and a radically different one which had supervened *after* the record in the Interstate Commerce Commission had been closed and which became demonstrable by provable facts *after* the District Court had entered the Orders affirmed and reinstated by this Court under its decision rendered June 10, 1946 (Record, page 2). This Petition presenting a cataclysmic economic change which had rendered unfair and inequitable and against the public interest as well as confiscatory the Plan of Reorganization for the Respondents theretofore approved and confirmed by the District Court was filed by the Respondents under authority of the decisions of this Court cited below in accordance with procedure approved by this Court in *Atchison, Topeka and Santa Fe Railroad Company* v. *United States*, 284 U. S. 248 and was

not, as the Opinion of Chief Justice HUGHES in the latter case plainly shows a Petition for Rehearing but was "a Petition in the nature of a Supplemental Bill" alleging new and radically altered economic conditions.[1]

The Order of the Circuit Court of Appeals sought by the Petitioners to have reviewed by this Court is in principle and in substance indistinguishable from the Order entered on August 6, 1946 in this Court by Mr. Justice REED in the *Matter of the Equitable Office Building Corporation* except that the stay granted by Mr. Justice REED was to preserve the status of the litigation pending possible review by this Court of an Order of the Circuit Court of Appeals in the Second Circuit which denied a stay whereas such a stay was in fact granted by the Order of November 2, 1946 entered by Circuit Judge PHILLIPS.[2]

In preparing the opposing Brief counsel for the Respondents have felt constrained in the interest of accuracy and of a correct understanding on the part of this Court of the factual situation and of the "Questions Presented" to disregard much, if not most, of what is said by the Petitioners and to state our own conception of the facts and to restate the Questions presented for consideration and determination by this Court. Again (since this is not our first complaint) the technique employed by the supernumerous counsel for the Petitioners seems designed to confuse rather than to inform and to complicate rather than to simplify.

We shall endeavor to be brief.

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[1] The Petition (page 2, par. 2) invokes the Opinions of this Court in *Ecker* v. *Western Pacific Railroad Corporation and others*, 318 U. S. 448; *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 318 U. S. 448; and *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company*, 90 L. Ed. 1134; 1138.

[2] The stay granted by Mr. Justice REED was in the case now pending in this Court on Petitions for *certiorari* under title *Charles A. Dana and others* v. *J. Donald Duncan, as Trustee*, Oct. Term, 1946, Nos. 609-612.

The Facts

The facts in addition to those stated above will be developed when needed in connection with the Argument. It should be emphasized, however, at this point that by the motion to dismiss all factual allegations of the Petition have been admitted to be true.

Questions Presented

I

Is the Circuit Court of Appeals authorized by law to stay proceedings in the District Court in order to preserve the status of the litigation pending exercise by it of its lawful appellate authority to review a determination of the District Court in a proceeding under Section 77 of the National Bankruptcy Act?

II

Is the Circuit Court of Appeals authorized by law to review an Order of the District Court denying on several grounds involving the merits a Petition of a Debtor in a proceeding under Section 77 of the National Bankruptcy Act to refer back to the Interstate Commerce Commission an approved and confirmed Plan of Reorganization alleging a new situation and "cataclysmic" economic changes which render the Plan unfair, inequitable and contrary to the public interest as well as confiscatory?

ARGUMENT

I

It is a part of the inherent and statutory authority of the Circuit Court of Appeals to stay proceedings in the District Court in order to preserve the status of the litigation pending exercise by it of its lawful appellate jurisdiction to review a determination of the District Court in a proceeding under Section 77 of the National Bankruptcy Act.

The foregoing proposition is implicit in the Opinion of Mr. Justice REED in the *Matter of the Equitable Office Building Corporation* referred to in our preliminary statement.[3] We are content to rest upon the analysis he makes and the authorities he cites. Reference accordingly is here made to U. S. Code, Sections 377 and 378 and to Bankruptcy Act, Section 2 (13) and Section 24.

The power to grant the stay is, however, necessarily dependent upon the appellate authority to which it is auxiliary.[4]

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[3] This Opinion is part of a record in this Court in connection with Petitions for certiorari in *Dana and others* v. *J. Donald Duncan, as Trustee*, Nos. 609-612.

[4] *Marbury* v. *Madison*, 1 Cranch, 137 (173-180); *Ex Parte Seibold*, 100 U. S. 371; *Ex Parte Peru*, 318 U. S. 578.

II

The Circuit Court of Appeals is authorized to review the Order of the District Court denying on several grounds involving the merits a Petition in a proceeding under Section 77 of the National Bankruptcy Act for a reference of the proceeding back to the Interstate Commerce Commission on the basis of admitted allegations of a new situation and "cataclysmic" economic changes which render the existing Plan of Reorganization unfair, inequitable and contrary to the public interest as well as confiscatory.

This head-note naturally divides into two constituents:

(A) *The Law,* (B) *The Facts.*

(A) *The Law:* The appellate authority of the Circuit Court of Appeals to review the Order of the District Court is granted by Section 24 of the Bankruptcy Act which as amended provides:

> "a. The Circuit Courts of Appeals in the United States * * * in vacation, in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy to review, affirm, revise or reverse both in matters of law and in matters of fact * * *."
>
> "b. Such appellate jurisdiction shall be exercised by appeal, and in the form and manner of appeal."
>
> (11 U. S. C. A. 47)

Under this Section practically all orders in bankruptcy are appealable within 30 days as of right or grace. *In re*

Fox West Coast Theatre, 88 Fed. 212, *certiorari* denied, 301 U. S. 710, 302 U. S. 772.

(B) *The Facts:* The Order of the District Court from which an appeal pursuant to the above authority is pending in the Circuit Court of Appeals determines (we contend erroneously) two justicable issues:

> (a) that the Order of November 29, 1944 (being the District Court Order of confirmation) having become final, conclusively determines all controversies concerning the Plan and the rights of the various classes of security holders to participate and it is not now competent for the Debtor to reopen those proceedings; and
>
> (b) that the Petition for Rehearing (sic.) fails to state a case which justifies reconsideration by this Court of the issues already determined (Record, fol. 14).

Disregarding the technical language here used in an effort to give the Respondents' Petition the character of one for a "Rehearing" (which it is not) the position of the Petitioners is (a) that the Order of Confirmation is a final decree which cannot be reopened; and (b) that because the Respondents in their Petitions in Nos. 278, 279, 280, 281 and 282—October Term 1945—had asked this Court to take judicial notice of the economic trends underlying their Petition in the District Court to which the above quoted Order relates this Court by its denial of those Petitions had foreclosed consideration of those new factors in the further progress of the proceeding.

Let it be noted first that the order of confirmation possesses no such quality of finality as Petitioners aver but is merely a step in the administration of the estate (*Wayne United Gas Company* v. *Owens-Illinois Glass Company*, 300 U. S. 131; *Meyer* v. *Kenmore Hotel Company*, 297 U. S. 160; *In re 1934 Realty Corporation*, 150 Fed. 2d, 477. Indeed

the opinion of this Court in this very case expressly precludes the claim that no further inquiries as to such major economic changes can be had (see pamphlet copy of opinion of Mr. Justice REED, page 18). Nor is there any indication that this Court attributed to the order of confirmation any such finality. On the contrary the mandate from this Court to the District Court was that "further proceedings be had in said cause *as according to right and justice* and the laws of the United States ought to be had, the said writs of *certiorari* notwithstanding."

It is well established as a basic principle of equity—and equity can only be what is right and just—that the Court may not enter a final decree or make any final disposition of a proceeding if the effect of conditions which have supervened since the record closed is to render such decree or disposition unfair and inequitable.

Reference is here made to the following authorities:

Randal v. *Brown*, 2 How. 406, 423;
Graffam v. *Burgess*, 117 U. S. 180, 192;
Atchison, Topeka & Santa Fe Railway Company v. *United States*, 284 U. S. 248;
Central Kentucky Natural Gas Company v. *Railroad Commission*, 290 U. S. 264;
United Corporation v. *Federal Trade Commission*, 110 F. (2d) 473.

In addition to these early cases we invoke the decisions of this Court in the cases of *Ecker* v. *Western Pacific Railroad Corporation and others*, 318 U. S. 448, and *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 318 U. S. 523, and the Opinion of Mr. Justice REED in the instant case rendered June 10, 1946. Recognizing the significance of these recent decisions on this phase Mr. Justice REED in his opinion in the *Equitable Building Corporation* case says:

"The effect of unanticipated changes of economic conditions after confirmation on the propriety of subsequent action by the reorganization Court to protect the interest of junior creditors also has not been judicially determined, finally."

The Order of the District Court now under review in the Circuit Court of Appeals presents this question in the regular way for determination by that Court. There is no persuasive reason why its appellate jurisdiction not yet exercised should be displaced. On the contrary it is the scheme of the Judiciary Act and the tradition of this Court to allow questions of this nature to be determined in the first instance by the Circuit Courts and not to intervene unless they disagree. The argument advanced by the Petitioners for a departure from this settled practice is that the new situation and the cataclysmic economic change upon which the Respondents' Petition avowedly rests were developed in detail in the Petitions for Rehearing filed by the Respondents in this Court following its decision of June 10, 1946. It is true that in those Petitions for Rehearing as well as in their Briefs and argument in this Court the Respondents asked this Court to take judicial notice of certain of the economic changes which they claim establish the injustice of the Plan of Reorganization they now seek to set aside. But the fact that those Petitions were denied by this Court cannot be tortured into an adjudication of that issue.[8] Under the terms of this Court's mandate the proceeding was remanded to the District Court to go forward with the same authority and with the same jurisdiction that it would have possessed if there had been no appeals from the Orders of October 25, 1943 and November 29, 1944.

It is not our purpose to enter into a discussion of the merits of the Respondents' Petition filed in the District Court on September 17, 1946. All of the factual allegations are admitted to be true and are true as a matter of wide-

[8] The subject of judicial notice and its lack of significance is developed by Mr. Justice CARDOZO in the Opinion of this Court in *Ohio Bell Telephone v. Public Utilities Commission of Ohio*, 301 U. S. 292.

spread common knowledge. The Petition alleges a decline in money rates indicating a possible reduction of 1½% in the interest and dividend rates prescribed in the Plan formulated in 1943 which if accomplished would involve an annual saving of $1,539,051. This sum if capitalized at 3½% would provide additional securities in the amount of $43,974,000—more than enough to make whole the holders of the Debtor's General Mortgage Bonds who under the 1943 Plan lose 90% of their investment. (Record, pages 4-7). The Petition alleges the sale by the Government to the United States Steel Corporation *since* the Order of Confirmation dated November 29, 1944 of the mid-continental steel plant at Geneva near Provo, Utah, for private operation. The over-all purchase price is stated to be $47,500,000 plus an undertaking on the part of the purchaser to expend a minimum of $18,600,000 to adapt the plant to the manufacture of steel products in addition to those for which it was constructed. This is a contribution of new earning power not contemplated by the 1943 Plan alone sufficient to provide a return on additional capitalization required to give full recognition to the Debtor's Preferred Stock in the amount of $17,000,000——all of which is lost under the 1943 Plan. (Record, pages 7-9). Finally there are allegations of a post-war national economy vastly different from what was contemplated in 1943. Unless and until the relationship of this new national economy to the raliway industry can be scientifically developed it would be manifestly unfair and unjust to put into effect the 1934 Plan which declares worthless the Common Stock investment in the Debtor held by the Missouri Pacific Railroad Company and the Western Pacific Railroad Corporation in equal shares. It is pertinent hereto note that an economic study as to that precise relationship has been undertaken and is now under way in the Interstate Commerce Commission.

Prior to the time when the gearing of post war national economy with the resultant business volume and national

income and all its relevant incidents was sufficiently evident to be set forth in a petition as a provable reality, many persuasive indications that there would be a very high peace time national economic level were called to the attention of this and other courts. These indications fell short of the demonstration.

Out of consideration of these indications the status of the problem suggested by them was made very clear to be

(a) the Commission is the sole agency for the determination of the economic basis upon which to erect the future capital structure, all details of that structure stemming from the economic basis for the future envisaged by the Commission; that basis is not affected by abnormal earnings (war earnings);

(b) the Commission may predicate its results upon envisioning and forecasting the result of economic trends which have not yet reached a reasonably stable level;

(c) the courts will not substitute judicial appraisement of such trends for a contrary Commission forecast;

(d) the Commission is not precluded from giving subsequent consideration to major economic changes which, if given effect, will materially change the basic assumptions upon which the capitalization and all incidents of the plan are predicated.

Now, and by its petition to the District Court, the Debtor is able to allege and prove the actuality of a cataclysmic change in the peace time level of national income, which is the index of the national productive and distributive effort. This demonstrable economic change reflects an elevation in national economy over prewar depression levels much greater than the drop from pre-depression to depression levels.

The close statistical tie between this national economic level and the volume of service the Debtor is called upon to

render, with its resulting income, is a basic fact recognized in the industry. In the early thirties, the Commission reported to Congress on this relationship and its report is quoted by Justice HUGHES in *Atchison et al.* v. *United States*, 284 U. S. at page 260, as follows:

> "The Commission also recognized in that report 'the very large reductions in railroad earnings which have accompanied the economic depression' and stated that 'the chief cause of these reductions has been loss of traffic.' For 'in such depressions the railroad suffers severely. *Their traffic is a barometer of general business conditions.*'" (Emphasis ours).

Debtor is able to allege with truth that its share of peace time business on the new national level for the year 1946 will yield a gross income greater than it ever realized prior to the depression. The normal net will be proportionate. The whole key to the certified Plan was an assumed level of gross income, "earning power", far below that demonstrated in this peace time era. The new level furnishes a new datum point for the Commission's entire survey and all its incidents. While considering that new high level of gross it can give proper consideration to the new low level of interest rates, the new basis for capitalizing income, and the entirely new situation in which it can approach the problem of its own power to establish rates which will yield a fair return without diverting business to competitive lines. On the thin business of the depression the Commission felt there was no room for such relief without such a diversion of business. No such restriction faces it in view of the great volume of demands in this new peace time era.

The underlying principle of justice in the *Atchison* case is truly not an orphan principle, for it finds recognition by the late Justice STONE in the case of *Central Kentucky Company* v. *Commission*, 290 U. S. 264. Both cases stand for the proposition that when an administrative body makes

an order that extends into the future, it is in duty bound to consider all factors that bear upon the justice of its order as applied to that future. It follows that if and when it appears that great unforeseen changes, which were not and could not be envisaged from the record upon which the order is based, develop to a provable state after such record is closed, it is the duty of the administrative body to resurvey its order in the light of those provable changes.

Certainly there is nothing in Section 77 or its scheme which commands a court of justice to "frustrate" the Commission in the performance of that duty by refusal to give the Commission an opportunity to function. That is all Debtor asks.*

In the *Atchison* case the right to have such a resurvey was asserted as an incident of due process. We quote Justice HUGHES' language:

> "This is not the usual case with possible fluctuating conditions but of a changed economic level and the prospect that the hearing may be long does not justify its denial if it is required by the essential terms of justice."

There ought not to be any serious question that the new situation outlined above and presented in detail in the Respondents' Petition in the District Court is one that should be the subject of scientific inquiry, study and analysis in and by the Interstate Commerce Commission before

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* Only today was our attention directed to the following striking statement in the Memorandum filed in this proceeding by Reconstruction Finance Corporation:

> "Because of the action of the Congress last Summer in passing the Bill known as S. 1253 and the reasoning of the President's Memorandum of Disapproval, dated August 13, 1946, both of which indicated disapproval of certain features of railroad reorganizations approved pursuant to the provisions of Section 77 of the Bankruptcy Act, which is the existing law, the RFC, as an agency of the United States created and existing by virtue of Congressional enactment, is not taking any position as to whether the petitions should be granted."

May we emphasize here that the Interstate Commerce Commission also is a governmental agency created by and responsible to Congress. Is it to be assumed that a different position will be taken by the Interstate Commerce Commission if and when this proceeding is referred back to it pursuant to the Respondents' Petition now under consideration in the Circuit Court of Appeals?

the Courts execute further cruel death sentences on records and facts dating back to 1943 when this Country was at war with both Germany and Japan and there was no dependable supporting data more recent than that of the pre-war depression.[1]

Finally: This Court can hardly blind itself to the obvious. The Petitioners seek to by-pass the Circuit Court of Appeals in the hope that thereby they may "beat the gun" known to be trained on them by the Congress and the President of the United States. To further such a purpose would indeed be a strange use for the writ of *certiorari*.

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[1] Attention is directed to the *New York Journal of Commerce* for November 25, 1946. From this it appears that the parties in interest have themselves agreed that the plan of reorganization for the Missouri Pacific Railroad system approved a year or more ago is now obsolete by reason of economic changes and must be abandoned. Application is to be made by them to the Court to send the proceeding back to the Interstate Commerce Commission for a new plan. A revised Plan is to be recommended to the Commission, certain details of which already have been published, which involves the scaling down of the proposed interest and dividend rates for the new securities to conform to the prevailing low levels. General creditors are to be protected and recognition given to the existing issues of both preferred stock and common stock. Under the present plan the unsecured debt and preferred and common stocks would be held worthless. In the same issue of the *Journal of Commerce* reference is made to new proposals conforming to the present day conditions in the proceeding for reorganisation of the Chicago, Rock Island and Pacific Railway Company.

November 27, 1946.

Respectfully submitted,

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